Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR. CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1145

BUDGET MARKETING, INC.,
JAMES WATSON and
RICHARD PROCHNOW - - - - Appellants

versus

COMMONWEALTH OF KENTUCKY, ex rel.
ROBERT F. STEPHENS, Attorney General - Appellee

On Appeal from the Supreme Court of Kentucky

MOTION TO DISMISS OR AFFIRM

STEVEN L. BESHEAR
Attorney General

BY: JOHN A. MILLER
Assistant Attorney General
209 St. Clair Street
Frankfort, Kentucky 40601
(502) 564-2200
Counsel for Appellee

March 31, 1980

Commonwealth Printing Co., Inc., Frankfort, Ky. Serv. Copyright, Ky.

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v.

COMMONWEALTH OF KENTUCKY, ex rel.
ROBERT F. STEPHENS, Attorney General - *Appellee*

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Kentucky on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of the validity of certain provisions of the Kentucky "Subscription Sales Act" (Kentucky Revised Statutes 367.510-.540

and 367.990(7); see pages 17 through 19 of Appellants Jurisdictional Statement).

This Act provides that persons soliciting orders for magazines or other periodicals which are conditioned upon advance payment by the purchaser are required to register with the county clerk in each county in which the solicitor intends to engage in solicitations either in person or over the telephone. The Act is designed to protect consumers from fraudulent or deceptive solicitations. Upon registration, the solicitor must pay a $5.00 service fee and in return the clerk must issue to the solicitor a numbered receipt. The solicitor must exhibit the receipt to any potential purchaser or, if soliciting by telephone, the solicitor must recite the receipt number to the potential purchaser. Upon registration, the solicitor must furnish the following information to the county clerk:

1. A description of the type of solicitations intended to be engaged in and a description of any motor vehicles to be used in the course of soliciting sales, or the telephone number from which telephone solicitations will be made;
2. The solicitor's name and social security number;
3. The mailing address and telephone number of his permanent residence;
4. The name, address and telephone number of the company or organization he represents, if any.

The Act further provides that all orders or contracts shall be voidable at the option of the purchaser

if the solicitor fails to comply with the Act. In addition, solicitors who violate the Act are subject to a fine of not more than $500.00 and/or a jail sentence of not more than six months for each offense.

B. The Proceedings Below

The Appellants are engaged in the interstate solicitation of magazine subscription sales. After the effective date of the Kentucky Subscription Sales Act, they engaged in solicitations of potential Kentucky purchasers by telephone in violation of the Act. Suit was brought by the Attorney General in Oldham Circuit Court. There being no genuine issue of material fact, the trial court entered summary judgment in favor of the Plaintiff and, in so doing, upheld the constitutionality of the Subscription Sales Act in the face of Appellants' contention that the Act violated the commerce clause of the Constitution. Subsequently, Appellants have appealed this case to the Court of Appeals of Kentucky and the Supreme Court of Kentucky. In each of those appeals, the constitutionality of the Act has been upheld.

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

In the written opinions of both the Court of Appeals and the Supreme Court of Kentucky in this case (see Appendix to Appellants' Jurisdictional Statement), due and careful consideration was given to this Court's pronouncements upon the propriety of state legislation which touches interstate commerce. In upholding the constitutionality of the Subscription Sales Act, the Kentucky courts were merely following well-established principles enunciated by this Court in the cases of *Kelly* v. *Washington,* 302 U. S. 1 (1937) (State inspection and regulation of tugboats engaged in intrastate and interstate commerce upheld); *Breard* v. *City of Alexandria, La.,* 341 U. S. 622 (1951) (Municipal ordinance prohibiting uninvited door-to-door solicitations upheld); *California* v. *Thompson,* 313 U. S. 109 (1941) (State regulation of transportation brokers upheld); and *Robertson* v. *California,* 328 U. S. 440 (1946) (State regulation of insurance solicitors upheld).

The unsubstantiality of this appeal is exemplified by Appellants' reliance upon cases some of which hold contrary to Appellants' thesis and all of which are plainly distinguishable from the central issue here. Specifically, *Eli Lilly & Company* v. *Save-on-Drugs,* 366 U. S. 276 (1971) and *Dunbar-Stanley Studios* v. *Alabama,* 393 U. S. 537 (1969) were both cases in

which the Court upheld state statutes in the face of a commerce clause challenge. *Robbins* v. *Taxing District of Shelby County, Tennessee,* 120 U. S. 489 (1887) concerned imposition of a *tax* which tended to discriminate against interstate commerce. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921) and *Allenburg Cotton Co., Inc.* v. *Pittman,* 419 U. S. 20 (1974) both involved corporate registration to do business statutes which were applied discriminatorily with insufficient justification to out-of-state corporations to deny them state court relief in otherwise valid contract actions. Similarly, *Raymond Motors Transportation, Inc.* v. *Rice,* 434 U. S. 429 (1978) involved state statutes and regulations that not only discriminated against interstate commerce but which also were shown to have no rational basis. Further, *Raymond* sets out the test for reviewing state statutes affecting interstate commerce, the application of which in the instant case plainly demonstrates the constitutionality of the Kentucky Subscription Sales Act. The Court said:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Raymond Motors Transportation, Inc.* v. *Rice, supra,* 441, 42 (quoting *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 142 (1970)).

There is substantial uncontradicted evidence in the record in this case that there is a need to protect Ken-

tucky's consumers from fraudulent and deceptive subscription sales solicitations. Appellants have not contended that the Subscription Sales Act fails to satisfy this need. Further, the Act applies evenhandedly to interstate and intrastate commerce. And, finally, the burden which it imposes upon interstate commerce is clearly incidental and very modest in character.

Appellants contend that when telephone solicitations emanate from across a state line only Congress can act to deter or remedy any fraud which may occur. Such belief is seriously outmoded and downright unreasonable. We do not need or want another federal law accompanied by more federal bureaucracy to enforce it. Conversely, it is not in the public interest that the state be handcuffed in dealing with fast talking, high pressure, long distance telephone solicitors who engage in fraudulent or deceptive practices. The Kentucky Act is a modest effort to give Kentuckians the means of being informed about people who want to do business with them. It gives Kentuckians some redress against those who refuse to provide even very limited information about their businesses. The $5.00 service fee is no more than is necessary to administer the record keeping portion of the Act and is certainly not a revenue measure. The information which must be provided is of the type that every solicitor would have at his fingertips. All of the information required to be given will easily fit on a single typewritten page. Appellants make much of the fact that registration is required in each *county* in which they conduct their systematic solicitation program. However, they fail

to mention that a copy of the *same* single typewritten page could be filed in every county in which they solicit. Plainly, Appellants' uninvited intrusions into the homes of Kentuckians will not be seriously hindered by the Act in question.

In view of the fact that the statute in the instant case imposes only minimal inconvenience and expense upon solicitors while evenhandedly effectuating a legitimate local public interest, there can be no real question that it comports with the requirements of the commerce clause of the Constitution as defined by this Court.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Kentucky.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

BY: JOHN A. MILLER
Assistant Attorney General
209 St. Clair Street
Frankfort, Kentucky 40601
(502) 564-2200
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss or Affirm was served on the Appellants, pursuant to Rule 33, by mailing three true and correct copies thereof to Hon. Robert Charles Ewald, Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky 40202; Hon. Robert B. Vice, Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky 40202; and Richard L. Rick, P.C., A Law Corporation, 4000 Ingersoll Avenue, Des Moines, Iowa 50312, this 1 day of April, 1980.

John A. Miller

Assistant Attorney General